

No. 11908

IN THE

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT

INLAND EMPIRE PAPER COMPANY,
a corporation,

Appellant,

vs.

HARTFORD STEAM BOILER INSPECTION
AND INSURANCE COMPANY OF HART-
FORD, CONNECTICUT, a corporation,

Appellee.

Reply Brief

*Upon Appeal from the District Court of the United
States for the Eastern District of Washington*

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Appellee's answering brief is a medley of assumptions and statements of supposed facts, which find no support in the record. For example, appellee does not attempt to answer, and cannot answer from the record the logical sequence of this accident as set forth on pages 38, 39 and 40 of appellant's brief. This Court will note that each step in this sequence refers to the pages of the record. Appellant Paper Company desires this brief to be of assistance to this Court in deciding from a review of the rather voluminous record whether appellant sustained the burden of proof that there was an accident within the purview of this insurance policy. Accordingly, this brief will be strictly in reply to the order of the discussion of the case by appellee in its brief.

The six "vital facts" set forth by appellee will be considered in that order.

1. The cited portions of the record, Tr. 258-260, do not support the bald statement that "There are numerous possible causes for an overspeeding of a Sumner steam engine." There was no other possible cause of overspeed in the entire record except the broken belt and the Insurance Company never named any. While the burden of proof never shifts, the Paper Company, plaintiff in the Trial Court, made a *prima facie* case so that the burden of going forward did shift. Appellee Insurance Company did not offer any cause for the overspeeding. The finding of the Trial Court was that the overspeeding was due to "some undetermined cause" which was never

named in the entire record. (Finding of Fact No. 3, Tr. 465). The cited portion of the record shows that after the belt broke, the overspeed resulted from a failure of the controls of the engine. The portions of the record cited by appellee Insurance Company are as follows:

“Q. This overspeed is caused by, may be caused by a number of things getting wrong with the governor, isn’t that right?

“A. Getting wrong with the controls of the engine.

“Q. The breaking of the governor belt from the engine to the governor is only one of many things that might set off an overspeed condition, isn’t that so?

“A. Well, the failure of the governing devices would cause an overspeed condition.” (Tr. 258).

These controls are the Brownell overspeed stop and the handpull safety stop, both of which operate the Butterfly Valve. (Ex. 8, 9, and 10; Tr. 136, 124-125, 134-135). The specious argument of appellee Insurance Company overlooks the fact that these governing devices might have been defective, but nevertheless their defective condition would not have made any difference if the belt of the Pickering governor had not broken in the first place. In other words, if the Pickering governor had functioned to keep the paper speed constant at all times the way it was supposed to, it would not have made any difference if there were no other controls. The following misleading and disjunctive question was asked on cross-examination and

is apparently the basis for appellee's whole argument:

Recross-examination by Mr. Paine:

“Q. But those can take place without the breaking of the governor belt;”

(The witness had been speaking of the failure of the governing devices, i. e., safety stop on the Pickering governor, Brownell overspeed stop and hand-pull safety chain, but counsel then joined that up with the following)

“that is just one of the things that might happen and cause the overspeed?” (Tr. 258).

(Counsel now talking about the breaking of the belt of the Pickering governor, but the witness answers “Yes” to the first part of the question).

2. The belt driving the governor on the engine was found across the frame underneath the governor. One end was across the frame, (Tr. 68-70) and not at the base of the engine.

3. The Sunner steam engine did continue at an idling speed for some minutes after the break-up of the machinery.

4. The Brownell overspeed stop would also bring the engine to an idling speed. (Tr. 196-201, 357).

5 and 6. The cited portions of the record, Tr. 451-452, simply refer to the mistaken opinion of the Trial Court and not the testimony of any witness. These cited portions are in direct contradiction to the fol-

lowing evidence of appellant Paper Company's master mechanic, who had been associated with the Paper Company for 23 years in charge of and responsible for the machines, (Tr. 187-188) who testified that the Butterfly Valve was 90% efficient and sufficiently tight to bring the engine to at least an idling speed even with all the load on.

"Q. Mr. Beguelin, I believe you've been sworn before. Mr. Beguelin, if the number 4 paper making machinery is engaged upstairs, and this Pickering governor on the Sumner steam engine in the basement trips, what effect does that have on the Sumner steam engine? * * *

"A. It would shut the supply of steam off from the engine.

"Q. And the engine would stop?

"A. It would, it should, stop.

"Q. Almost immediately?

"A. Very, very rapidly." (Tr. 351-352). * * *

"Q. Well, how close would this Butterfly Valve normally close?

"A. Oh, I would say 90 per cent, something like that.

"Q. Would the Butterfly Valve have stopped the machine at the time of the accident if it was in the condition in which Fullmer brought it up to your shop after the accident?"

(Wholly disengaged from the line, that is, with no load on).

"Mr. Paine: I object to that as a mere conclusion. The facts are in evidence as to what it did or didn't do.

"The Court: I've forgotten, there's been so

many witnesses, what his qualifications are, as an expert.

“Mr. Paine: He’s only the master mechanic.

(But see counsel’s remarks at page 193 of Tr.)

“Mr. Kelley: He’s the master mechanic, if the Court please.

“The Court: I’ll overrule the objection. He can testify in his opinion what it would have done.

“A. Well, I believe that would have stopped the engine, or slowed it down to less than a dangerous speed, at least.” (Tr. 353-354).

In other words, the Butterfly Valve would have the effect of bringing the engine to an idling speed. Furthermore, the Pickering governor stop would have operated automatically to stop the engine. This Pickering governor stop could not be adjusted to an idling speed. Appellee wholly ignores the record itself (Tr. 251-252, which is set forth on pages 41 and 42 of appellant’s brief) and cites instead the mistaken opinion of the Trial Court (Tr. 451-452) which was indeed contrary to that record.

There is no testimony in the record that the Butterfly Valve could not bring the engine to an idling stop without a load at the time of the accident; the conditions at the test were wholly different from those prevailing at the time of the accident.

- (a) The condition of the packing was comparatively cold.
- (b) The condition of vibration due to the operation of the machinery itself was absent.

When the test was made everything was quiet and there was no pulling and there was no vibration.

There was no other way the steam engine could get excessive speed except by the belt of its governor breaking. Appellee Insurance Company cannot point to any other possible way that the governor could have failed.

I.

APPELLEE'S ARGUMENT WITH RESPECT TO ASSIGNMENT OF ERRORS NOS. 1, 2 AND 4.

We are not concerned with the purpose of the Insurance Company in its experiments made on the Pickering governor in August. Just because the Pickering governor stop would bring the engine to an idling stop is no proof that the Pickering governor stop was the thing that did bring the engine to an idling stop. The Butterfly Valve could and did bring the engine to an idling stop regardless of the tests of "purely academic interest" made after the accident. The "trigger" of the Brownell overspeed stop could operate to close the Butterfly Valve as well as centrifugal force. This trigger, which could be tripped by hand, was only about one-half an inch away from the main belt of the Sumner steam engine to the line shaft pulleys (Tr. 188). Several years before the accident, this main engine belt (not to be confused with the belt of the Pickering governor) had been weaving from side to side on its pulley and because of its close juxtaposition to this trigger had tripped

the trigger of the Brownell overspeed stop. (Tr. 198-199). This main belt of the insured engine, during the overspeed of the accident in the case at bar, had become very loose and the pulley on which it was attached had been pulled forward towards the north approximately 8 to 10 feet by the explosion, so that it must have moved sideways at the time of the overspeed and must have hit the trigger because it was slack. (Tr. 188-189). Furthermore, after the wreck, the Brownell overspeed stop was found in a tripped position and it is undisputed that it did not work automatically by centrifugal force at 277 R.P.M., at which point it was supposed to work, because the engine went three times as fast before the explosion.

With reference to Fullmer's testimony on the point, all Fullmer's testimony amounted to was that the Butterfly Valve would not close 100%, but as has already been pointed out on page 34 of appellant's opening brief, a Butterfly Valve of this type normally never closes 100%, although this particular one in closing to one-eighth of an inch would have been enough to bring the engine to at least an idling stop. (Tr. 353-354). Furthermore, the test after the accident of the packing was made under cold conditions.

The case of *Fidelity Cas. Co. of N. Y. v. Griner*, 44 F. (2d) 706, cited by appellee Insurance Company is not in point at all. If it is at all apropos, it is authority for appellant Paper Company to this extent: Appellee Insurance Company makes the claim that there may "have been many possible causes for the

overspeed.” The cited case would hold that the burden was not on the appellant to raise all these causes and then to negative all the possibilities. Rather the case would indicate that the burden was sufficiently met by the appellant Paper Company when it established the broken belt as the cause of the overspeed. As was shown in part through the cross-examination of Insurance Company representative, Olinger, the undisputed facts are:

1. The governor was a part of the Sumner steam engine.
2. The belt was a part of the governor. (Ex. 12 was that belt.)
3. That belt was broken.
4. The broken belt prevented the continued operation of the Pickering governor.
5. The broken belt immediately impaired the functions of the Pickering governor.
6. The belt would have to be replaced before the operation of the Pickering governor could be resumed or its functions restored.

What else could have caused the overspeed of the engine?

II.

Appellee Insurance Company also states five “disputed” propositions which it insists that appellant Paper Company must prove in order to sustain the burden of proof. Appellant Paper Company submits that these propositions have been proved beyond dis-

pute and herewith sets forth these five propositions together with the specific portions of the record dealing with them with the thought that the record itself will be the most persuasive argument with this Court on these five points:

“1. That the Pickering governor’s stop had failed to function.” Testimony of Wheeler, engineer and operator for the Paper Company, who came on shift a short time after the accident. (Tr. 171, 178-179). Testimony of Insurance Company representatives who investigated two days after the accident. (Tr. 266, 271, 276, 292, 293, 295, 306, 324).

“2. That when the men on the paper machine floor pulled the safety chain, the pin did not come out to release the Butterfly Valve.” Testimony of superintendent of appellant Paper Company who came to the scene of the accident immediately. (Tr. 124-125). Testimony of workmen who pulled the handpull stop without stopping the engine, (Tr. 80-81) and affidavit of Fred Beguelin explaining why the pin did not come out in support of the motion for new trial. (Tr. 471-472).

“3. That the Brownell stop failed to function when the engine reached the speed at which it was supposed to function.” Testimony of master mechanic that Brownell was set for 700 feet paper speed. (Tr. 191-192). Testimony of manager of appellant Paper Company that Brownell stop had always functioned at that point before. (Tr. 220-221). Testimony of four different workmen and the superintendent of

appellant Paper Company as eye witnesses, that the engine was going three or four times as fast as that speed for which Brownell was set. (Tr. 77-78, 89-90, 93 to 95, 98-99, 111-112 and 122-123).

“4. That the driving belt danced around when it was released from the line shaft by the breakup of the line shaft and pulleys, tripping the trigger on the Brownell stop, releasing the chain and allowing the Butterfly Valve to close.” Testimony of master mechanic of appellant Paper Company that even during normal operations the main engine belt had tripped the trigger of the Brownell overspeed stop. (Tr. 198-199). His testimony that under abnormal operations after the explosion this could have happened because the main belt was so close. (Tr. 188-189).

“5. That the effect of the Butterfly Valve closing would be to reduce the speed of the engine to idling speed at a time when admittedly there was no load on the engines since the pulleys and line shafting and belt which drove the paper machine were broken.” Testimony of general manager of appellant Paper Company that the engine was idling. (Tr. 216). Testimony of master mechanic of Paper Company. (Tr. 251-252).

Appellant Paper Company proved the above five propositions and there was no conflicting testimony on these points, and appellee Insurance Company has been able to cite none in its brief. Appellant has no quarrel with the cases cited by appellee Insurance

Company holding that the finding of the Trial Court will not be reviewed except for plain or obvious error, but in the case at bar the judgment was against the weight of the evidence. The handpull safety chain could not have operated the Butterfly Valve to shut the engine down to an idling speed. This was against the physical evidence. After the chain attached to the handpull stop was pulled, the engine went even faster.

Yet the Trial Court held "Now both the Brownell stop and the hand stop up above operated on this Butterfly Valve." (Tr. 452). The Brownell operated only *after* the damage had occurred, after its trigger was struck, but the Handpull stop never operated. The Handpull stop broke. This was part of the engine which was covered by the policy. The Trial Court apparently disregarded the testimony of Janecek that the pin "didn't quite pull clear out," (Tr. 125), but should not have ignored the testimony to the same effect given by the workmen who pulled the Handpull stop without stopping the engine (Tr. 80), and who testified that this was done at least twice without result and that the break-up of the machinery only occurred after these two pulls (Tr. 81), or of the master mechanic (Tr. 201). Appellant Paper Company could not foresee how the Trial Court could possibly hold that the Handpull stop had worked in view of this uncontradicted testimony, but when the Trial Court did so rule, then the new physical evidence as to *why* the Handpull stop did not work was proffered. This new physical evidence was of the broken lever arm casting. If the Trial Court had

considered this new physical evidence and reopened the case to receive further testimony to show how it was physically impossible for the Handpull stop to have operated the Butterfly Valve, no such ruling as appears at Tr. 451 would have been made. Even the appellee Insurance Company would concede this according to its argument (Tr. 408) and its brief when it states that "it takes but a casual glance at Ex. 8 to see that that chain could not come up a foot or a foot and a half without coming out of its socket *or without breaking something.*" (Italics ours). The lever arm casting was broken. (Affidavit of Beguelin. Tr. 472).

There is no testimony in the record, nor does Beguelin's affidavit state that the arm "was pulled off." It was broken in the hub and held together, and Ex. 8 shows the triangular web which was placed at that hub.

Mr. Wheeler's testimony that when he saw the engine after the damage, the butterfly weight was hanging down and from its outward appearance closed (Tr. 181) was entirely consistent because *after* the accident the Brownell trigger was tripped. The Brownell trigger released the Butterfly Valve, not the Handpull safety chain.

Later on in its brief appellee Insurance Company states without citation from the record "If the Butterfly Valve is thus eliminated, there is clearly nothing left to bring the engine down to an idling stop except the Pickering governor stop." Appellee again ignores

the undisputed fact that the Brownell stop also operated the Butterfly Valve and that the Brownell stop operated not only automatically by centrifugal force but by manual contact with a trigger which is shown in Ex. 11, being a closeup of this Brownell overspeed stop. The Trial Court ignored the following testimony which at least made a prima facie case as to what operated the Brownell stop, which in turn closed the Butterfly Valve:

“Q. State whether or not that would be in close juxta-position to the trigger that I’m indicating on Exhibit 11?

“A. Yes, it would.

“Q. If you know, about how far is that trigger from the main pulley there that the main belt is driving?

“A. Well, it’s dead in line, I think almost exactly in line, with the face, and perhaps half or three-quarters of an inch away from the rim.

“Q. Could this main belt have hit the trigger by the fact that it was slack?

“A. It could.

“Q. Now, that trigger operates what is known as the Brownell overspeed stop?

“A. That’s right.” (Tr. 189).

The Trial Court erroneously placed the burden on the appellant to prove *why* the Brownell overspeed stop would not work by centrifugal force when it was the position of the Paper Company that the Brownell overspeed had been worked at the time of or after the breakup of the machinery by the belt coming in con-

tact with the trigger. The Trial Court said, "There hasn't been any explanation as to why it" (the Brownell overspeed stop) "didn't work. There has been shown to have been no defect in it." (Tr. 450).

Appellee Insurance Company further states in its brief "Incidentally, Mr. Wheeler testified that when he saw the engine after the damage, the butterfly weight was hanging down and from its outward appearance it was closed." (Tr. 181). Mr. Wheeler's testimony is consistent, because after the accident the Brownell trigger was in a tripped position and consequently had closed the Butterfly Valve. There is a wealth of evidence, as we have cited, that the Brownell stop failed to function normally by centrifugal force as shown by the fact that the insured Sumner steam engine was going at least 800 R.P.M., or almost three times the speed at which the Brownell overspeed stop had been set, and the No. 4 paper machine was driven faster than it had ever before been driven at an estimated speed of 2,000 lineal feet per minute. (Tr. 77, 89-90, 94-95, 105, 111-112 and 122-123). It was manifest error to rule that appellant Paper Company had to produce evidence *why* the Brownell didn't operate by centrifugal force. It did operate later by manual contact with the trigger. The master mechanic Beguelin did not testify that the engine under normal operating conditions would increase its speed with the Butterfly Valve closed. (Tr. 197-198).

III.

“APPELLANT’S MOTION FOR NEW TRIAL”

If the Trial Court had opened the judgment and taken additional testimony (as was moved by the appellant Paper Company under *Rule 59 of Civil Procedure for the District Court*) as outlined by Begue-lin’s affidavit, for example, that the “triangular web” piece that appears as (3) on Ex. G of his affidavit, (Tr. 472) was an additional piece that had to be welded on the broken lever arm of the Handpull Safety chain by the Paper Company after the accident, there wouldn’t have been any necessity for this appeal, because it would have been apparent *why* the Handpull Safety stop did not operate to close the Butterfly Valve and bring the engine to an idling stop. This was accomplished at the time of the breakup by the “trigger” of the Brownell being hit by the main engine belt. The Trial Court denied appellant’s motion, although at the time of the trial he had said, “We also have to assume, which has been pointed out here as *rather improbable, to me*, that although this Hand Safety stop had been set up, connected with a chain to the Butterfly Valve extending up into the upper room, where the paper machine was operating, a convenient handle in the floor, the men evidently had been instructed about it, knew it was there, and when this evidence of speeding was noticeable they ran over and they pulled that, and no doubt *pulled it violently and in a way that should have made it work.*”

Now, we have to assume that that didn't work, and then we have another point here." (Tr. 451). (Italics ours).

IV.

"THE BREAKING OF THE BELT DID NOT CONSTITUTE
AN ACCIDENT"

The language used in the policy evidently contemplated some fracture of some part of the engine. This occurred. The belt of the Pickering governor broke. The lever arm of the Handpull Safety chain also broke. The term "accident" was defined in appellee Insurance Company's policy by Schedule 6, paragraph (c) to cover these events.

V.

"THE BREAKING OF THE BELT IF IT WAS THE INITIAL
EVENT WAS NOT THE DIRECT CAUSE OF
THE DAMAGE"

It would not be helpful to this Court to discuss the cases cited by appellee Insurance Company which are wholly dissimilar in fact and not at all in point. We endeavored to review the authorities before trial, and we informed the Trial Court (Tr. 375) that we had not been able to find any case other than *Ocean & Accident Guarantee Corp. v. Penick & Ford*, 101 F. (2d) 493, that came near the instant problem. After considering those cited by appellee Insurance Company

with the exception of the *Ocean & Accident Guarantee Corp. v. Penick & Ford* case, which is also cited in appellee's brief, this court will observe that no other authority has been cited in point. This Court will observe from this record that the safety stop on the Pickering governor had been placed on the Pickering governor to stop the engine in the event that the belt of the Pickering governor broke. This had been so placed on the specific recommendation of the Insurance Company itself (Tr. 192-193, 223-224, Ex. 8, 15, 16 and 17). Prior to the time that the safety stop on the Pickering governor had been put on the insured engine, the only thing that would have stopped the engine in case of the belt breaking was the Brownell overspeed stop. (Tr. 223-224). Under such a theory advanced by appellee Insurance Company that the breaking of the belt was not the proximate cause of the accident, if any insurance company can get an assured in the position of the appellant Paper Company to install a safety device, such as the safety stop on the Pickering governor, for a part of the insured machinery, then the insured could never recover for an "accidental breaking" of that part because if the safety device which the insurer persuaded the insured to put on worked, there would be no damage. On the other hand, if the safety device, such as the safety stop on the Pickering governor, did not work, whether it be due to a loose set screw or for any other reason, there could never be any proximate cause within the purview of the policy and hence no recovery. Such an argument would be contrary to public

policy and the well established principle that an insurance policy is supposed to protect the insured.

CONCLUSION

The other portions of appellee's brief to which we have not replied do not really dispute appellant's theory. To answer all of appellee's contentions made without support of the record would only be to repeat what has already been stated in the opening brief. It is respectfully submitted that judgment should be reversed and the appellant recover the stipulated damages, or in the alternative that a new trial should be granted to permit further evidence along the lines of Beguelin's affidavit. This evidence would conclusively establish that the Brownell overspeed stop could not have been operated by the Handpull Safety chain and must have been operated by the "trigger," because it is undisputed that it did not operate normally by centrifugal force at the speed for which it was set. This was perhaps not emphasized sufficiently to the Trial Court, who was confused as to the Pickering governor stop and the Brownell stop as shown by the following:

"The Court: Pardon the interruption. There's a point that is a little confusing to the Court, the apparently conflicting theories with respect to these two stops. As I understand it, your theory is, or at least you subscribe to the contention that the Pickering stop worked?

"Mr. Paine: That's right.

"The Court: When the belt broke; all right,

if the Pickering stop functioned when the belt broke, then the engine, according to your theory, would have been immediately reduced to idling speed?

“Mr. Paine: That’s right.

“The Court: All right; what then could have thrown the Brownell stop, which has to attain an overspeed in order to trip automatically by centrifugal force?” (Tr. 395).

We appreciate that the Trial Judge was a very fair and able judge, but as this Court will find from an analysis of the record, this was a difficult and perplexing subject. The accident could only have happened as the appellant has outlined because the speed of the engine could not have increased if it had been “governed” at all times. The Pickering governor was supposed to do this. It didn’t because its belt broke.

Respectfully submitted,

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